

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 10 O'clock & 18 min A M
Date 6/16/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia PB

In the matter of:

RUFUS LEE GLOVER,

Debtor

Chapter 13 Case

Number 01-43454

In the matter of:

VANCE L. FULLER,

Debtor

Chapter 13 Case

Number 01-40412

**ORDER APPROVING APPLICATION FOR EMPLOYMENT
AND ORDER ON REQUEST FOR DETERMINATION OF ATTORNEY'S FEES**

On February 9, 2001, Vance L. Fuller filed for Chapter 13 bankruptcy protection, and on May 14, 2002, a modified plan of reorganization was confirmed. On November 13, 2001, Rufus Lee Glover filed for Chapter 13 bankruptcy protection, and on April 16, 2002, his plan of reorganization was confirmed. On October 30, 2002, attorney Benjamin Sheftall Eichholz filed a Motion to Settle Personal Injury Claim in each of these bankruptcy cases. The motion in Mr. Glover's case recited that on November 25, 2001, Mr.

cc: Debtor - Glover
Debtor's Atty. - Reddick
6/16/03
PB Debtor's Atty. Eichholz
Trustee - Brown

Glover had been injured in an automobile collision and that negotiations had resulted in a proposed settlement of \$12,250.00 in favor of Mr. Glover. The motion in Mr. Fuller's case was similar. It recited that on February 16, 2002, Mr. Fuller had been injured in an automobile collision and that negotiations had resulted in a proposed settlement of \$12,500.00 in favor of Mr. Fuller. In both motions, Mr. Eichholz sought 33 1/3 % of the settlement amount as attorney's fees pursuant to contingent fee contracts with the respective debtors, in addition to "expenses advanced" which totaled \$3,826.37 in the Glover case and \$65.00 in the Fuller case.¹

Attached to the motions to settle were separate applications for approval of employment in which Mr. Eichholz sought retroactive approval of his representation of each of these debtors in pursuing their post-petition tort claims. Also attached were settlement statements which set forth proposed settlements of \$12,250.00 in Mr. Glover's case and \$12,500.00 in Mr. Fuller's case, less attorney's fees and expenses advanced, and which showed the net amounts received by Mr. Glover as \$4,340.29 and by Mr. Fuller as \$8,268.33.

¹The sole expense in the Fuller case was \$65.00 for "costs advanced," and the expenses to be paid in the Glover case were itemized as follows:

Dr. Christopher Whelan (\$3,480.00);
Reimbursement to Medicare (\$231.12);
Costs advanced (\$115.25).

In addition, each settlement statement contained an acknowledgment by each debtor that he had already received the amount due him. Mr. Glover's settlement statement, which was signed by Mr. Glover on October 30, 2002, recited:

I acknowledge that I have this date received a check from my attorney, The Law Office of Benjamin Sheftall Eichholz, P.C., in the amount of FOUR THOUSAND THREE HUNDRED FORTY DOLLARS AND 29/100 (\$4,340.29) in the settlement of our claim

Mr. Fuller's settlement statement, which was signed by Mr. Fuller on October 31, 2002, similarly recited:

I acknowledge that I have this date received a check from my attorney, The Law Office of Benjamin Sheftall Eichholz, P.C., in the amount of EIGHT THOUSAND TWO HUNDRED SIXTY-EIGHT DOLLARS AND 33/100 (\$8,268.33) in the settlement of our claim

A hearing on the motions to approve the settlements was scheduled for December 18, 2002. Mr. Eichholz failed to appear at that hearing. He had informed neither the Debtors' bankruptcy counsel nor the Chapter 13 Trustee as to the merits of either tort case, and he had provided no information to assist in determining whether the settlements were in

the best interest of the debtors, their creditors, or their bankruptcy estates.

Thereafter, on December 20, 2002, this Court entered in each case an Order on Motion to Settle, which orders are attached hereto, collectively, as Exhibit A, setting forth numerous irregularities or instances of poor performance by Mr. Eichholz in matters before this Court. The orders approved the settlements and the remittances of \$4,340.29 to Mr. Glover and \$ 8,268.33 to Mr. Fuller. In light of uncertainty as to whether Mr. Eichholz would at any point have been appointed as attorney and as to the reasonableness of his fees, those orders also provided that the balances were to be held by the Chapter 13 Trustee pending further direction from this Court.

On December 26, 2002, Mr. Eichholz wrote a letter purporting to apologize for his behavior in these cases and in one other case; in fact, however, he blamed his staff for most, if not all, of the problems. In that same letter, he also indicated that he remitted to the Debtors on December 26, 2003, the amounts due each of them. Thereafter, on January 29, 2003, he filed a request for determination of attorney's fees which was scheduled for a hearing at 10:00 a.m. on February 13, 2003.

At the February 13 hearing, which was properly noticed, Mr. Eichholz again

failed to appear. On February 14, 2003, Mr. Eichholz filed a request to have the February 13 hearing rescheduled, asserting that the hearing notice had been "inadvertently placed on our office calendar for 2:00 p.m." Even though Mr. Eichholz had not appeared at either 10:00 or at 2:00 on February 13, I indulged him by again rescheduling the hearing for April 17, 2003.

Mr. Eichholz appeared at the April 17 hearing and explained his bases for recommending settlement of the Debtors' respective cases, but he was unable to articulate how many hours he had spent prosecuting the matters. When questioned about disbursements, his answer indicated that he had made no disbursements until after this Court had issued its Order of December 20, 2002. When asked about his original applications in which Mr. Glover had acknowledged receipt of \$4,340.29 on October 30, 2002, and Mr. Fuller had acknowledged receipt of \$8,268.33 on October 31, 2002, Mr. Eichholz responded that the settlement statements were done "prematurely" and that they were "in error." He could not, however, explain why the settlement statements purported to show the debtors' earlier receipt of money.

The two issues before the Court are (1) whether Mr. Eichholz should be retroactively appointed to serve as these debtors' personal injury counsel and (2) the amounts, if any, that he should be permitted to receive as attorney's fee in light of all the circumstances.

This is a core proceeding under 28 U.S.C. § 157 (b) (2) (M) in which this Court has jurisdiction pursuant to 28 U.S.C. § 1334 (a) and the general order of reference of the District Court of the Southern District of Georgia issued under authority of 28 U.S.C. § 157 (a).

DISCUSSION

The bankruptcy estates of Mr. Glover and Mr. Fuller (collectively, “the Debtors”) were created upon filing of their Chapter 13 petitions. *See* 11 U.S.C. § 541 (a). Property of a Chapter 13 debtor’s estate, in addition to encompassing “all legal and equitable interests of the debtor in property as of the commencement of the case,” *id.* § 541 (a) (1), also includes “all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted,” *id.* § 1306 (a) (1).

This Court has jurisdiction over property of the Debtors’ bankruptcy estates, *see* 28 U.S.C. § 1334 (e), and use of the property of their estates to pay attorneys or other professional for services rendered must be approved by this Court, *see id.* § 327 (e) (authorizing employment of attorney “for a specified special purpose,” subject to court approval); *id.* § 1303 (giving debtor power to use estate property as authorized under § 363

(b)). The estate property in these cases includes the cash settlements awarded in the tort actions in which the Debtors were represented by Mr. Eichholz, *see id.* § 1306 (a) (1).

Although lack of prior court approval in employing an attorney representing a Chapter 13 debtor in bankruptcy justifies denial of compensation, a bankruptcy court has equity power to enter an order *nunc pro tunc* where such retroactive appointment is necessitated by fundamental fairness. Lavender v. Wood Law Firm, 785 F.2d 247, 248 (8th Cir. Cir. 1986). Such appointment “is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made.” Order on Mot. Settle Personal Injury Claim, In re Fuller, Chapter 13 Case No. 01- 40412, slip op. at 3-4 (Bankr. S.D. Ga. Dec. 12, 2002) (Davis, J.).

In these cases, Mr. Eichholz, a member of the bar of this Court, would have been appointed earlier had a timely application been made; however, with the benefit of hindsight, I am not convinced that such appointment would have been prudent. Had this Court known that Mr. Eichholz would display a cavalier attitude toward this Court’s directives, *see id.* at 4-5 (enumerating Eichholz’s acts and omissions in three cases before this Court), I would have been hesitant to assume that his performance on behalf of the Debtors would serve the best interests of the Debtors and their bankruptcy estates. With respect to cases of debtors

under this Court's jurisdiction whose tort cases Mr. Eichholz has handled, Mr. Eichholz has failed to appear at hearings, has failed to provide information needed by the Court, has failed to present any evidence supporting the reasonableness of his fees, has blamed his staff for his misdeeds, has delayed remitting to one debtor her share of settlement proceeds despite court order to do so, has had debtors sign statements that they received funds that in fact they had not received, and has filed those statements in pleadings in this Court. In response to the Court's expressed concerns, Mr. Eichholz could "only strongly assure [the Court] that [he] would be *even more careful and diligent* in [his] bankrupt-approved settlements in the future." Letter of Jan. 6, 2003 (emphasis added). Given the series of actions, omissions, and late-filed motions on the part of Mr. Eichholz regarding these debtors and one other debtor under this Court's jurisdiction, denial of Mr. Eichholz's application for employment would be justifiable.

Nevertheless, in light of the settlements which the Debtors and the Trustee agreed were satisfactory, Mr. Eichholz's employment cannot be said to be entirely without value to Debtor and his bankruptcy estate. For reasons of fundamental fairness, *see Lavender*, 785 F.2d at 248, this Court will therefore refrain from denying his employment applications.

However, the contingency fee agreements between Debtor and Mr. Eichholz were never approved by this Court, and no evidence is before this Court to justify awards in

the requested amounts. In the absence of an approved contingency fee contract, the fee must be established under 11 U.S.C. § 330 (a) (3), which provides:

In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

... [and]

(C) whether the services were . . . beneficial at the time at which the service was rendered

11 U.S.C. § 330 (a) (3) (A), (C).

The lodestar approach is to be used to determine the amount of an award of reasonable attorney fees. Norman v. Housing Auth. of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988) (noting that Supreme Court “elected the lodestar approach because it produces a more objective estimate and ought to be a better assurance of more even results”). The lodestar rate is derived by multiplying a reasonable hourly rate by the number of hours expended. Id.

“The fee applicant bears the burden of establishing entitlement and

documenting the appropriate hours and hourly rates.” Id. at 1303. Here, Mr. Eichholz had no idea how much time he had devoted to representing either of these debtors in their respective cases. Given his inability to sustain even the slightest of burden in proving a reasonable fee amount, this Court has no direct evidence to support an award of compensation in any amount. It is clear, however, that some effort was expended on behalf of these debtors, and the Court is permitted to draw on its experience in similar matters in determining the amount of an award. See id.² Drawing on that experience, I find that Mr. Eichholz would, at minimum, met with the client, opened a file, made a demand for settlement and negotiated the amount to be paid. The time devoted to these services is unknown, but compensable in some amount in the discretion of the Court.

Therefore, in the exercise of that discretionary authority, I will not deny fees in their entirety but will allow attorney fees in the total amount of \$1,000.00 in each case. In addition, expenses advanced by Mr. Eichholz in the amounts of \$3,826.37 in the Glover case and \$65.00 in the Fuller case will be allowed.

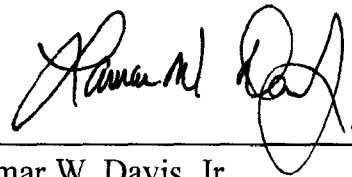
²“For decades the law in this circuit has been that ‘[t]he court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.’ ” Norman, 836 F.2d at 1303 (quoting Campbell v. Green, 112 F.2d 143, 144 (5th Cir. 1940)).

ORDER

Pursuant to the foregoing discussion, IT IS THE ORDER OF THIS COURT that the applications for approval of employment of Attorney Benjamin Sheftall Eichholz in the cases of Rufus Lee Glover and Vance L. Fuller are hereby GRANTED.

IT IS FURTHER ORDERED that:

- (1) Attorney fees for services rendered by Benjamin Sheftall Eichholz and fees advanced in settling the tort claims of Rufus Lee Glover and Vance L. Fuller are hereby APPROVED in the total amounts of \$4,826.37 in the Glover case and \$1,065.00 in the Fuller case;
- (2) The Chapter 13 Trustee shall remit to Mr. Eichholz, *instantly*, payment in those specified amounts; and
- (3) The Trustee shall remit the balances on hand to the Debtors: to Mr. Glover, \$3,083.34 and to Mr. Fuller, \$3,166.67.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of June, 2003.